

**Before the
Federal Communications Commission
Washington, D.C. 20445**

In the Matter of)	
)	
Phoenix Broadcasting, Inc.)	Fee Control No. 00000RROG-03-071
Stations KSWD and KPFN)	
Seward, Alaska)	
)	
Request for Waiver of FY 2000)	
Regulatory Fees)	

MEMORANDUM OPINION AND ORDER

Adopted: December 8, 2003

Released: December 15, 2003

By the Commission:

1. The Commission has before it an Application for Review filed by Phoenix Broadcasting, Inc. (Phoenix). Phoenix seeks review of a decision of the Managing Director denying its petition for reconsideration.¹ Phoenix had requested that the Managing Director reconsider its letter ruling denying waivers of the fiscal year (FY) 2000 regulatory fees and associated late fees for Stations KSWD and KPFN in Seward, Alaska on grounds of financial hardship.² For the reasons set forth below we deny the Application for Review.

BACKGROUND

2. Phoenix is the licensee of full-service Stations KSWD and KPFN(FM), which are licensed to serve Seward, an Alaskan community of fewer than 5,000. It sought a waiver on financial hardship grounds of the Fiscal Year 2000 regulatory fee of \$300 for each of its two stations.³ In particular, it alleged that the stations were in a precarious financial condition due to the continued operation in Seward of FM translator Stations K285EG and K272DG, licensed to

¹ Letter from Mark A. Reger, Chief Financial Officer, Office of Managing Director, Federal Communications Commission, to David Tillotson, Counsel, Phoenix Broadcasting, Inc. (dated January 31, 2003).

² Letter from Mark A. Reger, Chief Financial Officer, Office of Managing Director, Federal Communications Commission, to David Tillotson, Counsel, Phoenix Broadcasting, Inc. (dated September 24, 2002) (*September 24 Letter Decision*).

³ Phoenix has not paid the \$300 regulatory fee or the \$75 late charge for either station. See *September 24 Letter Decision*, ¶ 1.

Peninsula Communications, Inc. (Peninsula), in violation of FM translator rules in effect since 1990.⁴ Due to the potential competitive impact of translator stations on full service radio broadcast service particularly in less populated areas, the Commission authorizes FM translator stations on a secondary basis only under rules restricting their service, ownership, sources of financial support, and program origination.⁵ As amended in 1990 to emphasize the secondary nature of FM translator service, Sections 74.1231(b) and 74.1232(d) setting forth the signal delivery and eligibility requirements, preclude operation of the Seward FM translators.

3. The fee waiver request was premised on the Commission's alleged failure to enforce its February 2000 decision ordering Peninsula to cease operating the two Seward FM translator stations⁶ and to expedite its May 2001 show cause order against Peninsula.⁷ By its *September 24 Letter Decision*, the Office of Managing Director (OMD) denied Phoenix's waiver request for failure to present a compelling case of financial hardship as required by the Commission's rules but invited the licensee to refile with appropriate supporting documentation. Instead of submitting any documentation, Phoenix sought reconsideration. It pointed to statements in the Commission's February 2000 termination order to the effect that the Seward FM translator stations were "taking between \$4,000 and \$6,000 per month in radio revenues out of Seward," and that their continued operation "would be a clear detriment to the continued viability of full service broadcast stations licensed to Seward." *Peninsula Communications, Inc.*, 15 FCC Rcd 3293, 3295 ¶ 9 (2000). In denying reconsideration, OMD ruled that the Commission's orders in *Peninsula* addressed issues unrelated to fee waivers and therefore could not be relied on to support Phoenix's claim of sufficient financial hardship for a waiver.

4. In its Application for Review, Phoenix maintains that OMD erred in denying its waiver request. No further documentation of financial hardship is required to justify a waiver, Phoenix contends, given what it describes as the Commission's clear finding in *Peninsula* that continued operation of the FM translators jeopardizes the very viability of Phoenix's two full-service broadcast stations in Seward. Phoenix also objects to having to pay regulatory fees intended to defray the cost of regulation and based on the value of the license when it believes the Commission's failure to enforce translator rules in effect since 1990 has seriously devalued

⁴ By virtue of waivers in effect until May 10, 2003, Peninsula has rebroadcast on those stations the signals of Peninsula's primary full service Stations KPEN-FM (Soldotna, Alaska) and KWVV-FM (Homer, Alaska). *Peninsula Communications, Inc.*, 18 FCC Rcd 4027 (2003) (modifying the licenses for Stations K272DG and K285EG to terminate the previously granted waivers of Sections 74.1231(b) and 74.1232(d)).

⁵ See generally *Amendment of Part 74 of the Commission's Rules Concerning FM Translators*, 5 FCC Rcd 7212 (1990), *recon. denied*, 8 FCC Rcd 5093 (1991) (Hereafter *FM Translators*).

⁶ *Peninsula Communications, Inc.*, 15 FCC Rcd 3293 (2000) (ordering termination of the Seward waivers within 60 days in light of commencement of operation of Station KPFN(FM)).

⁷ *Peninsula Communications, Inc.*, 16 FCC Rcd 11364 (2001) (order rescinding February 2000 termination of the waivers but ordering Peninsula to show cause why its licenses for the Seward FM translator stations should not be modified to discontinue previously granted waivers).

Phoenix's licenses. In particular, Phoenix asserts the Commission delayed enforcing the February 2000 termination order directing Peninsula to cease operating the Seward translator stations and failed to expedite the May 2001 order directing Peninsula to show cause why the Seward translator licenses should not be modified to eliminate waivers necessary for their continued operation in Seward. Phoenix claims that it has continued to operate the full power stations to its financial detriment in the hope that the Commission will eventually enforce its translator rules, enabling it to eke out a profit, notwithstanding the community's small advertising base.

DISCUSSION

5. We will deny the application for review. The Commission is statutorily required to assess and collect regulatory fees based on the annual cost to the Commission of certain regulatory activities. 47 U.S.C. § 159(a)(1). Such fees may be waived, reduced or deferred, but only upon a showing of good cause and a finding that the public interest will be served thereby. 47 U.S.C. § 159(d); 47 C.F.R. §1.1166. *See also Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for Fiscal Year 1994*, 9 FCC Rcd 5333, 5344 (1994), *recon. denied*, 10 FCC Rcd 12759 ¶12 (1995). The Commission has narrowly interpreted its waiver authority to require a showing of compelling and extraordinary circumstances that outweigh the public interest in recouping the Commission's regulatory costs. 9 FCC Rcd at 5344 ¶ 29. Fee relief may be granted based on asserted financial hardship, but only upon a documented showing that payment of the fee will adversely impact the licensee's ability to serve the public. 10 FCC Rcd at 12761-62 ¶ 13 (stating that "[m]ere allegations or documentation of financial loss, standing alone," does not suffice and that "it [is] incumbent upon each regulatee to fully document its financial position and show that it lacks sufficient funds to pay the regulatory fee and to maintain its service to the public"). *See also Assessment and Collection of Regulatory Fees for Fiscal Year 2003*, FCC 03-184 ¶ 13 (released Jul. 25, 2003) (reflecting continued belief that the public is served by affording relief from fees to assist a financially distressed regulatee in remaining an effective competitor but capping such relief to preserve agency's ability to collect statutorily required fees). *See also* 47 C.F.R. § 1.1166(c) (waiver requests that do not include required fees will be dismissed unless supported by documentation of financial hardship).

6. As OMD advised Phoenix, "[r]egulatees can establish financial hardship by submitting 'information such as a balance sheet and profit and loss statement (audited, if available), a cash flow projection ... (with an explanation of how calculated), a list of their officers and their individual compensation, together with a list of their highest paid employees, other than officers, and the amount of their compensation, or similar information.'" *September 24 Letter Decision*, citing 10 FCC Rcd at 12761-62 ¶ 13. For the reasons set forth below we agree with OMD that Phoenix is not entitled to rely for this purpose on various Commission actions in *Peninsula* addressing issues that do not concern Phoenix's eligibility for waiver of the regulatory fees associated with Stations KSWD and KPFN. And, in the absence of a documented showing of insufficient funds to pay the regulatory fees, Phoenix has not made a compelling showing that overrides the public interest in the Commission's recouping the costs of its regulatory activities.

7. In particular, notwithstanding Phoenix's contention, the Commission has not made a "clear finding" in *Peninsula* or elsewhere that Stations KSWD and KPFN are suffering significant financial hardship so as to call into question their livelihood, or otherwise made an assessment of the stations' actual financial condition for purposes of granting regulatory fee waivers. Assessing eligibility for a fee waiver requires examination of a station's financial documentation to determine if payment of the fee will prevent the station from maintaining its service to the public. The issue in *Peninsula* related not to Phoenix's eligibility for a fee waiver but to the continuing public interest viability of Peninsula's waivers of FM translator rules, without which it could not operate the Seward FM translator stations. The statements in *Peninsula Communication, Inc.*, 15 FCC Rcd 3293, 3295, regarding the amount of monthly radio revenues potentially siphoned off by the Seward FM translator stations thus do not purport to assess the current financial situation of the Phoenix stations or their ability to pay the regulatory fees and still provide full service broadcast service to that community. Rather, the findings cited by Phoenix represent only a generalized assessment as to the potential competitive impact of the continued operation of the FM translators on any full service broadcast station licensed to serve Seward.

8. It is possible, of course, that competition from the translator stations may have affected Phoenix's ability to pay its regulatory fees. But that fact does not mean that Phoenix can avoid the need to make the mandatory showing that has consistently been required under our rules and policies. Phoenix, having chosen to rely solely on the Commission's licensing and enforcement actions in the *Peninsula* proceeding, and having declined OMD's invitation to submit the necessary support for fee relief, has failed to provide the required documentation to warrant a waiver on grounds of financial hardship.

9. ACCORDINGLY, IT IS ORDERED That the Application for Review filed on February 18, 2003 by Phoenix Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary